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No. 93-1674

IN THE

Supreme Court of The United States

OCTOBER TERM, 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK and JOHN BORDEN,

Petitioners,

-vs.-

SHARON KARIBIAN and MARK URBAN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Court of Appeals for the Second Circuit followed the standards enunciated by this Court in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) and in *Harris v. Forklift Sys., Inc.*, 114 S.Ct. 367 (1993) regarding sexual harassment in the workplace.

II. Whether an employer is liable pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, for a "hostile environment" created by a supervisor through the use of the authority delegated to him by the employer.

III. Whether an employer is liable pursuant to Title VII where the employee submits to the unwelcome "*quid pro quo*" sexual advances of the supervisor and suffers no economic detriment.

IV. Whether an employer's express policy against sexual harassment and available complaint procedures insulates the employer from liability pursuant to Title VII where the sexual harassment consisted of a supervisor's exploitation of authority delegated him by the employer.

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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION

Respondent, Sharon Karibian, opposes the petition of The Trustees of Columbia University in The City of New York ("Columbia University" or "Columbia") for a Writ of

January 25, 1994 in *Karibian v. Columbia University, et al.*, No. 93-7188[1].

In the petition for certiorari, petitioner presents an inaccurate analysis of the holding of the Court of Appeals, thereby greatly overstating its importance. As described herein, certiorari should be denied in this case because:

1) the Opinion does not conflict with any decision of this Court or of any other Court of Appeals;

2) this case does not present special or important reasons for the granting of certiorari; and

3) the Opinion correctly interprets Title VII of the Civil Rights Act as it applies to sexual harassment in the workplace.

STATEMENT OF THE CASE

In 1987, and at all times relevant, Sharon Karibian was a student of Columbia University and worked in its telemarketing office on campus. Mark Urban was employed in 1987 at Teachers College, which is an institution within Columbia. [RS2145][2]

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[1] The decision of the Court of Appeals (herein, the "Opinion") is attached to the petition at Appendix A1 and is reported at 14 F.3d 773 (2d Cir. 1994).

[2] "R" and "RS" refer to pages in the Joint Appendix and Supplemental Appendix, respectively, from the Record before the Court of Appeals.

In or around the spring, 1987, while the parties were in equal positions socially, and were employed in different parts of Columbia, Urban determined to "pursue" Karibian. [R468,151] Karibian's unwavering response at that time was to avoid him. [R188]

In early September, 1987, Urban was appointed Columbia's Development Officer for Annual Giving, which placed him in control of Columbia's telemarketing office, where Karibian worked. Specifically, Urban had the authority to alter Karibian's work schedule and assignments, and to give her promotions and raises. [R153,221,223]

Upon acquiring a position of direct supervisory responsibility over Karibian, Urban continued his pursuit by repeatedly inviting her out to bars, ostensibly to discuss work-related matters. [Pet.A4] On those occasions, Urban often encouraged Karibian to drink, touched various parts of her body and kissed her cheek. [R214-215,250] Starting in January, 1988 Urban made repeated requests that Karibian go with him to his apartment. [R155]

Initially Karibian rebuffed Urban's advances; ultimately, however, she was coerced into a violent sexual relationship with Urban upon his representation that she "owed him" for all he was doing for her as her supervisor. [R231-2,212,298] Thereafter the terms and conditions of Karibian's employment - including her salary, schedule, autonomy and flexibility - varied from time to time depending on her responsiveness to Urban's demands. [Pet.A5] Karibian continued to subject herself to this abusive relationship because she believed she would be fired if she did not give in to Urban's demands. [R277,311]

By September, 1988 Karibian could no longer tolerate Urban's abuse. [R334-5] Accordingly, she followed the procedures outlined in Columbia's sexual harassment bulletin, which purports to protect victims of sexual harassment, but in fact steers them to informal avenues of dispute resolution where their rights and remedies are vaguely defined and minimally addressed. [R66-67] The bulletin provides that a person who is being sexually harassed should "seek a resolution" of the problem through discussion with the person directly concerned; otherwise, she may (1) bring the problem to the attention of a member of the Sexual Harassment Panel, or (2) seek advice from the Equal Opportunity and Affirmative Action office ("EOAA"). *Id.* A Panel member, with the consent of the complainant, may refer the matter to the EOAA and General Counsel for unspecified "further action". A victim is further informed that she may employ "the applicable University grievance procedure. . .including the University Discrimination Grievance Procedure that is available if no other University grievance procedure is specifically applicable." *Id.* How one identifies or pursues the applicable grievance procedure is not disclosed. *Id.*

Karibian complained to Panel member Mary Murphy that her hours had been cut because she was not having sex with her boss anymore and that, in her opinion, there was "a very obvious cause and effect". [R279-280] Karibian inquired what could be done. [R280] Murphy's sole response was to advise Karibian that she should expect to be harassed because she was attractive and that she should just "try to work it out". [R280-1] Murphy made no attempt to mediate a resolution or initiate a formal complaint on Karibian's behalf. [R278-9]

Shortly after her meeting with Murphy, Karibian met with Ruth Curtis, Columbia's Equal Opportunity Coordinator, and

reiterated her claim of quid pro quo harassment. [R402-3] Karibian advised Curtis that Urban had "pursued" her, that he insisted on discussing work-related issues out of the office after hours "over coffee", and that the terms and conditions of her employment changed depending upon her responsiveness to his expressed personal interest in her. [R284-5,350,402-3,417] She stated that during periods when she responded to him personally Urban had given her a raise, extra work, more autonomy, and flexibility in her work schedule. [R367-407] However, once she stopped meeting his demands, Urban became hostile, cut her hours, and terminated her higher level jobs. [RS2372] Karibian stated that she believed her supervisor had made job opportunities available to her in the past as a "bribe", and that she "felt pressured" to respond to him. [R395,406-8,284-5,367] Curtis neither encouraged Karibian to permit an investigation, nor recommended any course of conduct intended to end the harassment. Instead she told Karibian that she had no legal claim. [R282-3]

On January 30, 1990, Karibian met with Gertrude de la Osa, the personnel director, to discuss her continued employment at Columbia. [R242-3] She advised de la Osa that she was afraid of losing her job because Urban was constantly sabotaging her job performance [R246,RS959-965], and threatening to fire her, in retaliation for her refusal to continue a coerced sexual relationship. [R243,RS1420] She stated further that Urban physically abused her, frightened her and forced her to have sex with him. [R246]

On February 23, 1990, Karibian returned to Columbia's EOAA office and described to Curtis what had transpired since their first meeting two years earlier. [R413] Later that same day, Curtis and de la Osa formulated recommendations regarding how to handle the problem. [R431,466] These

recommendations focused in substantial part on Urban's "poor communication skills" and were not formulated pursuant to any investigation. [R417,450,398-416,RS2383,2391] At no time were Karibian's immediate supervisors or co-workers interviewed. Instead, Curtis and de la Osa simply concluded that Karibian was a "woman scorned" and devised recommendations which did not address the harassment. [R466,431,3754-5] In so doing they not only protected Urban but also tacitly approved the continued victimization of Karibian.

Urban was permitted to maintain his position as supervisor of the Telefund office. [R239,373,382] Karibian was stripped of her responsibilities and her position was advertised in the New York Times. [R236-8,372,435-6,463-7] Shortly thereafter, on or about April 16, 1990, Karibian was asked to resign her position, which she refused to do. [R449,376]

Urban's resignation was not sought until three months after Karibian's January 30, 1990 complaint to de la Osa, and then only after Columbia received unsolicited confirmation that Karibian had in fact been subjected to violent, physical abuse by Urban. [R476-7] Despite the evidence of wrongdoing, Columbia offered Urban a letter of reference and severance pay. [R477]

Shortly after Karibian refused to resign, and prior to receipt of the results of a pending audit regarding the viability of Columbia's telemarketing procedures, Columbia terminated its on-campus telemarketing operations for a three month period, and laid off all the workers. [R385-6,459,RS1732-1733] When Karibian was laid off she was not advised that the telemarketing operation would resume or that, according to Columbia's personne' policies, she was entitled to a hiring preference. [RS2284-5]

REASONS FOR DENYING THE WRIT

This case involves no novel issues of federal employment discrimination law requiring consideration by this Court. The Second Circuit Court of Appeals applied this Court's reasoning in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) and in *Harris v. Forklift Sys., Inc.*, 114 S.Ct. 367 (1993) in holding an employer liable for sexual harassment committed by a supervisor who used the authority delegated by the employer to effectuate the discriminatory conduct. Considering the factual allegations made in this case, the Court of Appeals correctly did not consider the efficacy of the employer's policies and procedures for remedial action in its determination of employer liability.

The Opinion follows established standards for employer liability and basic common law principles of agency. It does not expose employers to any new liabilities, nor require any burdensome or unlawfully intrusive measures. If anything, it provides an incentive for employers to educate their supervising personnel as to an employee's rights under Title VII, and therefore should result in fewer claims of discrimination.

Further, although the Court of Appeals did not reach the question, the Judgment below is also correct because plaintiff's allegations are sufficient to support a finding that Columbia University's policies and procedures were ineffective in providing plaintiff a prompt remedy, and that Columbia's response was retaliatory.

I

THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT

The decision of the Court of Appeals is entirely consistent with this Court's opinions in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) and in *Harris v. Forklift Sys., Inc.*, 114 S.Ct. 367 (1993). The conflict claimed by petitioner arises only due to a gross misreading of the Opinion and this Court's rulings.

A. Employer Liability for Karibian's Hostile Environment Claim[3]

Contrary to petitioner's assertion, the Court of Appeals did not announce a blanket rule of absolute employer liability in hostile environment cases. Rather, applying agency principles, the Court held that ". . . an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship." Opinion, Pet. A14.

The Court of Appeals specifically distinguished employer liability for *quid pro quo* harassment, which is always

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[3] A hostile work environment occurs "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment,'" *Harris*, 114 S.Ct. at 370 (quoting *Meritor*, 477 U.S. at 65, 67).

imputed to the employer, from that for hostile work environment, which the Court stated requires a specific basis for finding employer liability. Opinion, Pet.A12. The Court found that employer liability was appropriate in this case due to particular allegations raised regarding Urban's use of his supervisory authority:

> The essence of Karibian's hostile work environment claim is that her supervisor capitalized upon his authority over her employment to force her to endure a prolonged, violent and demeaning sexual relationship. If the factfinder accepts Karibian's allegations, Columbia is liable to Karibian because Urban abused his delegated authority to create a discriminatorily abusive work environment.

The Court contrasted this case to cases where a low-level supervisor does not rely on his supervisory authority to carry out the harassment. Under such circumstances ". . . the employer will not be liable unless 'the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it. (citation omitted)" Opinion, Pet.A14.

Thus the Court of Appeals followed the mandate of *Meritor*, 477 U.S. at 72-73, and looked to common law principles of agency for guidance in determining the question of employer liability for Karibian's hostile environment claim and did not impose a standard of absolute liability. Opinion, Pet.A13-15. This reasoning is consistent with this Court's determination that "Congress' decision to define 'employer' to include any 'agent' of the employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor*, 477 U.S. at 72.

Columbia's suggestion that the Opinion contradicts this Court's precedent by its failure to consider the question of the adequacy of Columbia's policies and procedures countering sexual harassment is simply erroneous.[4] This Court specifically warned in *Meritor* that the absence of notice or the employer's provision of a reasonable avenue for notice will not necessarily shield an employer from liability for hostile work environment claims. *Meritor*, 477 U.S. at 72, citing Restatement (Second) of Agency §§219-237 (1958). Applying established agency principles to the facts alleged in this case, the Court did not need to reach the question of the adequacy of Columbia's policies and procedures. In so doing, the Opinion is consistent with this Court's decision in *Meritor*.

B. Karibian's Claim For Quid Pro Quo Sexual Harassment

The Opinion is also consistent with Supreme Court precedent in its finding that Karibian's allegations constitute a claim under the *quid pro quo* theory of sexual harassment despite the absence of economic injury.

Columbia's representations notwithstanding, this Court has firmly and repeatedly rejected the argument that Title VII requires proof of "tangible loss" of "an economic character". *Meritor*, 477 U.S. at 64-65 (noting favorably that the "EEOC Guidelines fully support the view that harassment leading to

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[4] Karibian maintains that consideration of Columbia's procedures in this case would not have affected the Court's ultimate conclusion of employer liability and reversal of summary judgment. Karibian's allegations are more than sufficient to support a finding that Columbia had notice of her complaints and did not provide prompt, remedial action. *See Statement of the Case, supra.*

non-economic injury can violate Title VII"); *Harris*, 114 S.Ct. at 370.

Petitioner compares Karibian's claims to those reviewed in *Meritor* and, without basis, suggests that this Court "did not view [*Meritor*] as a *quid pro quo* case" because the employee had submitted to the sexual advances and suffered no economic detriment or undeserved gain. (Pet. at 9) However, there is no discussion in *Meritor*, either by this Court or the Courts below, concerning the fact that the plaintiff suffered no economic loss. Rather, in *Meritor* the plaintiff's *quid pro quo* claim was dismissed by the District Court after an eleven day trial upon the factual finding that the supervisor had not required "sexual favors as a condition of . . . employment" and that any sexual relationship between the parties "was a voluntary one having nothing to do with [plaintiff's] continued employment . . . or her advancement or promotions . . . " *Vinson v. Taylor*, 23 Fair Empl. Pra. Cas. (BNA) 37, 42 (D.D.C. 1980).

The standard applied by the District Court in *Vinson v. Taylor*, as quoted in this Court's decision on review, does not require a showing of economic loss. "It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as *a condition to obtain employment or to maintain employment or to obtain promotions* falls within protection of Title VII" (emphasis added by this Court, *Meritor*, 477 U.S. at 68). This Court faulted the District Court's analysis for only two errors, neither of which concern the question of economic loss, 1) that the District Court failed to consider the plaintiff's claim under the "hostile environment" theory of sexual harassment, and 2) that the correct focus of inquiry was whether the alleged sexual advances were unwelcome, not whether plaintiff's participation was voluntary.

Moreover, in *Harris v. Forklift Sys., Inc.*, this Court confirmed that the proper focus of inquiry is not the injury suffered by the victim of harassment but rather the alleged harassment itself. *Harris*, 114 S.Ct. at 370 (psychological harm to victim is not required in hostile environment case; the proper question is whether the complained of conduct created an objectively hostile environment and whether the victim subjectively perceived the environment to be abusive).

Thus contrary to petitioner's argument, the Opinion is consistent with Supreme Court precedent.

II

THERE IS NO CONFLICT IN THE CIRCUITS

A. Hostile Environment

Consistent with the mandate of *Meritor*, the Second Circuit applied traditional agency principles in holding that "an employer is liable for the discriminatory abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship." Opinion, Pet.A14. The Court noted that "[i]n contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers . . ." *Id.*

Columbia asserts that the Second Circuit's decision conflicts with decisions of other Circuits because there the Courts "looked to whether the employer knew or should have known of the alleged harassment, and whether the employer had a

policy and effective procedures designed to allow for prompt, remedial action." [Pet. at 10-11] However, in each of the decisions relied upon by Columbia the harasser was either the plaintiff's co-worker, or, if the harasser was the plaintiff's supervisor, the supervisor did not exercise supervisory authority to further the harassment. Under such circumstances, the questions of notice and an employer's procedures are relevant to the determination of employer liability. Opinion, Pet.A13. *Swentek v. US Air Inc.*, 830 F.2d 552 (4th Cir. 1987) (alleged harasser pilot "did not exercise corporate authority as an instrument for harassment (of stewardess), [h]ence the usual indicia of agency not present"); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d. 307 (5th Cir. 1987) (employer not liable where it responded virtually overnight to allegation of co-worker harassment); *Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988), *cert denied*, 490 U.S. 1110 (1989) (racial harassment by co-workers not a violation of Title VII where the employer did not condone the harassment but took prompt remedial action); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317 (7th Cir. 1992) (employer not liable for harassment where alleged harasser for whom plaintiff did occasional typing was not her supervisor and employer responded to complaint upon its filing); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984) ("sexual harassment by a co-employee not a violation of Title VII unless employer knew or should have known of harassment and failed to take immediate action"); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990) (employer not liable where harasser was not aided by the agency relationship in perpetrating the harassment); *Steele v. Offshore Shipbuilding Inc.*, 867 F.2d 1311, 1317 (11th Cir. 1989) *reh'g denied* 874 F.2d 821 (11th Cir. 1989) (no liability for hostile work environment where harassment did not relate to the supervisor's "supervisory authority", and employer took

prompt remedial action); and *Carmon v. Lubrizol*, 17 F.3d 791 (5th Cir. 1994) (employer not liable where it took prompt and remedial action in response to co-worker harassment).[5]

Columbia's reliance upon *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993) and *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987) is entirely misplaced. In *Saxton* the Court held that the plaintiff's allegations did not establish that the supervisor's conduct was so frequent or severe that it interfered with her work, or that it otherwise created an abusive work environment. The Court then noted that the plaintiff could not prevail in any event because the employer had acted promptly and reasonably in response to her complaint. But that determination was specifically premised upon the Court's finding that the supervisor was not so highly placed in the organization as to be considered the company's agent. Significantly, the Court noted that where the supervisor has the authority to act on behalf of the employer "the employer may be held liable regardless of whether it could reasonably have foreseen or prevented the misconduct, for in that instance the acts of the managerial employee constitute the acts of the employer."

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[5] Columbia's assertion that the Second Circuit's decision conflicts with its previous decisions in *Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992) and *Carrero v. New York City Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989) is similarly without merit. [Pet. p.11 fn.6] In *Carrero* the Court found employer liability based upon plaintiff's *quid pro quo* claim and therefore determined it unnecessary to address the standard of liability under plaintiff's hostile environment claim. In *Kotcher*, a hostile work environment case, the harasser did not use his actual or apparent authority to further the harassment alleged. Accordingly, as the Second Circuit expressly noted, the Opinion is entirely consistent with the Court's decision in *Kotcher*. Opinion, Pet.A16.

Saxton, 10 F.3d at 536 fn.19.

In *Sparks* the Court did not, as Columbia alleges, consider the employer's remedial action, or lack thereof, as relevant to the issue of employer liability. To the contrary, in ruling on plaintiff's hostile environment claim, the Court held that the employer was strictly liable for the discriminatory acts of a supervisor who acted with the employer's actual and apparent authority. *Id.* at 1560. "This liability is direct; the employer cannot find shelter in the claim that it neither had notice of, or approved of, the unlawful conduct." *Id.* at 1559. *Accord*, *Hunter v. Allis-Chalmers Corp. Engine Div.*, 797 F.2d 1417, 1422 (7th Cir. 1986); *Horn v. Duke Homes*, 755 F.2d 599, 604 (7th Cir. 1985); *see Meritor v. Vinson*, 477 U.S. at 72; *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982).

B. *Quid Pro Quo*

In evaluating plaintiff's claim of *quid pro quo* harassment the Second Circuit noted that "[b]ecause the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment - either actually or apparently - the law imposes strict liability on the employer for *quid pro quo* harassment." Opinion, Pet.A9. Accordingly the Court held that "[t]he relevant inquiry ... is whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances. It is enough to show that the supervisor used the employee's acceptance or rejection of his advances as the basis for a decision affecting the compensation, terms, conditions or privileges of the employee's job." *Id.* at A10.

The Second Circuit's analysis is entirely consistent with

other Circuits, which in *quid pro quo* cases have questioned whether the acceptance or rejection of the harassment is an expressed or implied condition of the receipt or loss of tangible employment benefits. *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 912 (1st Cir. 1988); *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 461 (7th Cir. 1990); *Jones v. Wesco Investments, Inc.*, 846 F.2d 1154, 1156 (8th Cir. 1988); *Jones v. Flagship Int'l.*, 793 F.2d 714, 722 (5th Cir. 1986), *cert. denied* 479 U.S. 1065, 107 S.Ct. 952 (1987); *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *see also Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046-7 (3rd Cir. 1977) (pre-*Meritor*).

Nevertheless, Columbia asserts that the Second Circuit's Opinion is in conflict with other circuits because the Court failed to consider the "employer's policy and procedures and agency principles". [Petition, p.12] On the contrary, the Second Circuit's analysis relied entirely upon agency principles. Citing its prior holdings in *Kotcher* and *Carrero*, the Court noted that it is because the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment that the law imposes strict liability on the employer for *quid pro quo* harassment. Opinion, Pet.A9. The Court then considered and rejected altering the strict liability standard in "submission" cases due to the absence of proof of economic harm.

> True, in the typical *quid pro quo* case, the employee who refuses to submit to her supervisor's advances can expect to suffer some job-related reprisal . . . Accordingly, in such "refusal" cases, evidence of some job-related penalty will often be available to prove *quid pro quo* harassment. But that is not to say that such

> evidence is always essential to the claim. In the nature of things, evidence of economic *harm* will not be available to support the claim of the employee who *submits* to the supervisor's demands . . . The supervisor's conduct is equally unlawful under Title VII whether the employee submits or not . . . We do not read Title VII to punish the victims of sexual harassment who surrender to unwelcome sexual encounters. Such a rule would only encourage harassers to increase their persistence.

Id. at A9-10.

The Second Circuit additionally concluded that imposing an actual economic loss requirement in a *quid pro quo* "submission" case would place "undue emphasis on the victim's response to the sexual harassment. The focus should be on the prohibited conduct, not the victim's reaction. While the employee's submission to the supervisor's advances is certainly relevant, it bears only on the issue whether the sexual advances were unwelcome, not whether unwelcome sexual advances were unlawful." *Id.* at A11.

The cases cited by Columbia do not support a contrary result. *Chamberlin v. 101 Realty, Inc.*, *Jones v. Flagship Int'l.*, and *Lipsett v. Univ. of Puerto Rico* are refusal, not submission cases. Moreover, the Courts in *Chamberlin*, *Jones*, and *Lipsett* did not find liability on a *quid pro quo* claim based upon a finding that the employer lacked effective remedial procedures, as Columbia alleges. [Petition at p.12] In both *Chamberlin*, 915 F.2d at 785 and *Lipsett*, 864 F.2d at 901, 905, the First Circuit followed the dictates of *Meritor* and the standard set forth in *Henson v. City of Dundee*, 682 F.2d 897, 908-911 (11th Cir. 1982) and held that the employer was strictly liable for *quid pro quo* harassment. In

Jones, 846 F.2d at 1156 fn.5, the Eighth Circuit affirmed a District Court's finding that the employer had created a hostile work environment.

Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205 (D.R.I. 1991) is also inapposite to Columbia's position. In *Showalter* one plaintiff submitted to the supervisor's sexual demands for a *menage a trois* with him and his secretary for fear of losing his job, while the second plaintiff refused the same demand despite the threat of loss of medical benefits and job opportunities. Citing *Chamberlin* the Court held that both asserted a *quid pro quo* claim, even though neither plaintiff suffered or gained economically for their response to the threats. That standard of liability was not affected by the availability of a grievance procedure, which the Court considered solely in its determination as to whether the plaintiffs had welcomed the sexual advances. *Showalter*, 767 F. Supp. at 1211-1212.

Thus with respect to its conclusions regarding Karibian's claims of *quid pro quo* and hostile work environment, the Opinion is consistent with the decisions of the other Circuits.

III

THIS CASE DOES NOT RAISE IMPORTANT QUESTIONS OF FEDERAL LAW AND IS CONSISTENT WITH THE PURPOSES OF TITLE VII

The Opinion raises no important questions of law that need to be resolved by this Court. Contrary to petitioner's assertion, the Opinion does not contradict established law on employer's liability in sexual harassment cases and does not expand that liability to all claims of supervisory misconduct.

The finding of employer liability in the Opinion is limited to the particular factual allegations of this case, i.e. that Karibian was forced to submit to the sexual perversions of her supervisor as a condition of her continued employment by Columbia, and that the supervisor used his supervisory powers to demand a violent and demeaning sexual association, thereby creating an abusive work environment over a prolonged period of time. Thus the basis for the finding of liability is not simply the harasser's supervisory position, but the harasser's use of authority entrusted him by the employer.

This is entirely consistent with the definition of "employer" in Title VII which includes any "agent" of the employer. Here, where the supervisor wielded his authority as Columbia's agent to extort sexual favors and impose a hostile work environment, his actions are correctly attributed to Columbia. This is not a novel finding. *Cf.* EEOC Policy Guidance on Current Issues of Sexual Harassment, *EEOC Notice* No. N-915.035 (Oct. 25, 1988), *reprinted in* EEOC Compliance Manual (CCH) ¶ 3112 at 3255 (when a supervisor uses a position of authority to harass subordinate, "the employer is liable under both the 'quid pro quo' and the 'hostile environment theories'").

Petitioner argues, based on policy concerns, that even where there is clear agency conduct, Courts should shield an employer from liability if it has issued a policy statement against sexual harassment and provided a reasonable avenue for complaints and remedial action. Petitioner asserts that this exception to traditional agency principles is necessary in sexual harassment cases to provide employers an incentive to take these preventative measures. This argument is without merit. Employers have an incentive to enact policies and complaint procedures because such mechanisms will reduce

the instances of harassment and the damages for which they can be held liable. And, in those cases where the harassment is not connected to an agency relationship, the existence of effective procedures will alleviate the employer from any liability. It would be against public policy to allow an employer to immunize itself from liability for its agents' illegal conduct simply by issuing policy statements which generally oppose the misconduct and by providing procedures for notification of illegal acts. The purpose of Title VII is not only to discourage sexual harassment on the job but also to provide a meaningful remedy when harassment occurs. While the first is laudatory and beneficial to society as a whole, the second is essential to victims such as plaintiff and to the mission of Title VII. Policies and procedures alone are inadequate to protect against the social and economic inequities underlying sexual discrimination when the powers of the employer are used to effectuate the discrimination.

Petitioner further argues that an employer should be allowed to shield itself from liability under basic agency principles in sexual harassment claims because there is a "fine line between purely private relationships between individuals in the workplace and sexual harassment" and because employers cannot impose rules which may infringe upon their employee's privacy rights. (Pet. at 14-15).[6] However, sexual harassment, like any other form of employment discrimination, has little to do with "private relationships" or a person's right to privacy. It is the unlawful treatment of employees based upon their sex in a very public forum, the workplace. Although some cases may

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[6] New York Labor Law Section 201-d (Pet. A35) prohibits an employer from enacting rules against *lawful* associations between employees and has no bearing on an employer's right and duty to prohibit sexual harassment.

present a difficult factual determination as to whether particular conduct is objectively offensive and unwelcome, the divide between sexual harassment and purely private relationships is unambiguous and distinct. Simply stated, when the treatment of an employee is based on the employee's sex and is unwelcome, it is illegal. When an employer has entrusted its authority in an agent who abuses that authority, it is sound policy to hold the employer responsible for the agent's illegal conduct.

Further, it is contrary to the purpose of Title VII to place the burden on the employee to resist sexual blackmail on the job and rely on the employer's complaint procedures. When a supervisor uses the employer's authority he *becomes* the employer *vis-a-vis* the employee, and an employee should not be required to complain to the employer about itself. Studies have shown that victims of sexual harassment are too often coerced into tolerance, and do not make such complaints for reasons of economic need, humiliation and embarrassment, fear of retaliation, and distrust that an employer will effectively respond to a complaint against a supervisor. National Council for Research on Women, *Sexual Harassment: Research & Resources*, (Hallgarth and Capek, eds., 1992). It is the employer, not the victim, who is in the better position both to prevent a supervisor from using his delegated authority to sexually harass a subordinate employee and to pay the cost if such harassment occurs.

CONCLUSION

The Court of Appeals' decision is consistent with Supreme Court precedent and does not conflict with decisions of the other Circuits. The Opinion follows established law and imposes no new liabilities or restrictions on employers. It merely enforces the purposes of Title VII to afford victims of

sexual harassment the protection of law.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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